

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
EZEQUIEL MAURICIO ROMO,  
  
Defendant and Appellant.

C063642  
  
(Super. Ct. No.  
04F05789)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MARCO AVALOS,  
  
Defendant and Appellant.

C063909

Co-defendants Ezequiel Mauricio Romo and Marco Avalos, both in custody in state prison, attacked another inmate, stabbing him with a handmade weapon. A jury found both defendants guilty of assault with a deadly weapon by a person confined in state

prison serving less than a life term (Pen. Code § 4501; undesignated references are to this code). The jury also found that defendant Avalos used a deadly and dangerous weapon during commission of the assault. The trial court sentenced defendant Avalos to 26 years to life and defendant Romo to eight years.

Both defendants appealed. We affirmed defendants' convictions but found that the trial court failed to try the prior strike conviction allegations. We therefore vacated both defendants' sentences and remanded the matter "for a bench trial on the prior conviction allegations only and for resentencing."

The trial court vacated defendants' sentences and, after conducting a bench trial, found true three prior strike conviction allegations against defendant Avalos and one prior strike conviction allegation against defendant Romo. The court reimposed the previous sentences.

Both defendants filed a second appeal and we appointed separate counsel to represent them. Counsel for each defendant filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Each defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant Avalos.

We did, however, receive a supplemental brief from defendant Romo comprised of a single claim which, according to the heading, requests us "to make an independent review of the

record on appeal" pursuant to *Wende*. Notwithstanding that heading, defendant Romo argues that although his crime was indeed "very serious," his sentence is "cruel an[d] unusual punishment under the federal and state Constitutions."

Defendant cites various authorities regarding the law of cruel and unusual punishment, including the factors to be considered in evaluating "'the nature of the offense and/or the offender, . . . ,'" such as "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts," and "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*People v. Dillon* (1983) 34 Cal.3d 441, 479 (*Dillon*) [we note that *Dillon* has been abrogated by statute in regard to second degree felony murder, which is not at issue here. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1186)].) Defendant attempts to apply the *Dillon* criteria by arguing that there is no evidence that he was armed during the commission of the offense for which he was convicted, as he "was not bloody, and no wounds or bruises were found on him after the incident occurred"; that "correctional officer's [sic] failed to identify the suspect or witness visible on the videotape and specifically omitted [sic]"; and that the evidence identifying him was questionable.

To the extent defendant Romo is claiming his sentence constitutes cruel and unusual punishment under the federal and state Constitutions, he provides some authority but no analysis or application of the law to the relevant facts of the case. To avoid forfeiture of his claim of error, defendant Romo had the burden to support his arguments with analysis and citation to evidence in the appellate record. (*People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1159.) He did not do so and, on that basis, we reject his claim.

To the extent defendant Romo is claiming there was insufficient evidence to support his conviction, his time to raise that claim has passed, as this court previously affirmed the trial court's conviction following defendant's first appeal and thereafter the remittitur issued. Thus, the judgment of conviction became final. (§§ 1263, 1265; *In re Phillips* (1941) 17 Cal.2d 55, 59 [a judgment of conviction rendered and affirmed on appeal is final in the sense that it is no longer possible to contest the guilt of the defendant upon the merits of the case].) We therefore reject defendant's claim on that ground as well.

The recent amendments to section 4019 do not operate to modify either defendant's entitlement to credit, as both defendants have prior convictions for one or more serious or violent felonies. (§ 4019, subds. (b), (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.)

Having undertaken an examination of the entire record, we find no arguable error in favor of defendants.

### DISPOSITION

The judgments are affirmed.

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HULL, J.

We concur:

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RAYE, P. J.

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NICHOLSON, J.